

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL,
CUTTACK.**

S.A. No.289(VAT) of 16-17

(Arising out of the order of the learned JCST(Appeal),
Ganjam Range, Berhampur First Appeal No. AAV-
15/2015-16, disposed of on 04.10.2016)

Present: **Shri G.C. Behera, Chairman**
 Shri S.K. Rout, 2nd Judicial Member
 &
 Shri B. Bhoi, Accounts Member-II

M/s. Vishal Enterprises,
Brajaraj Nagar 2nd Line,
Berhampur.

..... Appellant

-Vrs.-

State of Odisha, represented by the
Commissioner of Sales Tax, Odisha,
Cuttack.

..... Respondent.

For the Appellant : Mr. R.P. Sahoo, ld. Advocate
For the Respondent : Mr. S.K. Pradhan, ld. A.S.C.(C.T.)

Date of Hearing : 19.06.2023 * Date of Order : 30.06.2023**

O R D E R

This second appeal has been preferred by the dealer-assessee against the order of the Joint Commissioner of Sales Tax (Appeal), Ganjam Range, Berhampur (in short, 'ld.FAA') passed on 04.10.2016 in the First Appeal Case No. AAV-15/2015-16 in remitting the order of assessment back to the Sales Tax Officer, Ganjam-I Circle, Berhampur (in short,

1d.STO') for fresh adjudication with the dealer-assessee having not advanced reasonable opportunity of being heard at the time of assessment under Section 43 of the Odisha Value Added Tax Act, 1999 (in short, 'OVAT Act').

2. The facts in nutshell of the case are that M/s. Vishal Enterprises, Ganjam, TIN-21591903105, is a proprietorship firm carrying on business in vermicelli, spices, rice, biscuits etc. on whole-sale basis effecting purchases both from inside and outside the State of Odisha. Proceedings u/S.43 of the OVAT Act has been initiated by the 1d. STO for the tax period 01.04.2004 to 31.12.2012 basing on the Fraud Case Report No.22/2012-13 received from the DCST, Enforcement Range, Berhampur and raised demand of ₹14,20,233.00 which includes penalty of ₹9,46,822.00 imposed u/S. 43(2) of the OVAT Act. The dealer-assessee being aggrieved preferred the first appeal. The 1d.FAA inclined to remand the order of assessment that to the 1d. STO for assessment afresh.

3. The dealer-assessee being not satisfied with the first appeal order preferred second appeal before this forum adducing grounds of appeal that the 1d. FAA has erred in law in not redressing the pertinent issue raised by the appellant in the grounds of appeal to the effect that there could be no

assessment under section 43 of the OVAT Act without completing an assessment either under section 39, 40, 42 or 44 of the OVAT Act.

4. Cross objection has been filed by the respondent-State supporting the order of the forums below.

5. Heard the contentions and submissions of both the parties in this regard. The order of assessment and the order of the ld. FAA coupled with the materials on record are gone through. Section 39(2) of the OVAT Act has been amended introducing the concept of 'deemed' self assessment only with effect from 1st October, 2015. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking section 43(1) of the OVAT Act required a dealer to be assessed under sections 39,40,42 and 44 for any tax period. Decision of the Hon'ble High Court of Odisha pronounced in case of ***M/s. Keshab Automobiles Vs. State of Odisha*** in Para 22 of the said verdict lays down as under.:-

“From the above discussion, the picture that emerges is that if the self-assessment under Section 39 of the OVAT Act for tax periods prior to 1st October, 2015 are not 'accepted' either by a formal communication or an acknowledgement by the Department, then such assessment cannot be sought to be re-opened under Section 43(1) of the OVAT Act and further subject to the

fulfillment of other requirements of that provision as it stood prior to 1st October, 2015.”

The aforesaid decision of the Hon’ble High Court of Odisha has been upheld by the Hon’ble Supreme Court of India in SLP (C) No.9823-9824/2022 dated 13.7.2022 which reads as follows:-

“We have gone through the impugned order(s) passed by the High Court. The High Court has passed the impugned order(s) on the interpretation of the relevant provisions, more particularly Section 43 of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Articles 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed”

In the present case, it is revealed that the assessment framed under the OVAT Act relate to the tax period from 01.04.2010 to 31.12.2012 which entirely covers the pre-amendment period. The learned assessing authority is learnt to have not adhered to the requirement of preconditions as required under section 39 of the OVAT Act for initiation of proceedings under section 43 of the OVAT Act. He has reopened the assessment simply on the basis of the A.G. audit objections. There is no evidence available on record as to

communication of the assessment made U/s.39 of the OVAT Act to the dealer-assessee. The ld.FAA has also ignored the maintainability of the case and has confirmed the order of assessment. In view of the above principles of law, we are constraint to infer that the assessment made in the impugned case is not maintainable in law and as such, the same is liable to be quashed.

6. Resultantly, The appeal stands allowed and the order of the learned assessing authority and the ld. FAA are hereby set-aside. As a necessary corollary thereof, the assessment order is hereby quashed. The cross objection is disposed of accordingly.

Dictated and corrected by me.

**Sd/-
(Bibekananda Bhoi)
Accounts Member-II**

**Sd/-
(Bibekananda Bhoi)
Accounts Member-II**

I agree,

**Sd/-
(G.C. Behera)
Chairman**

I agree,

**Sd/-
(S.K. Rout)
2nd Judicial Member**